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In The

Supreme Court of the United States

October Term, 1971

No. 71-667

BERNARD M. GROSS and HARRIS J. SKLAR,
Petitioners,

v.

RAYMOND R. WALSH, TRUSTEE in BANKRUPTCY OF THE ESTATE OF TIME SALES FINANCE CORPORATION, Bankrupt
and
JEROME ROSOFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

Bernard M. Gross and
Harris J. Sklar,

Petitioners,

v.

Raymond R. Walsh, Trustee in
Bankruptcy of the Estate of Time
Sales Finance Corporation, Bankrupt
and
Jerome Rosoff,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bernard M. Gross and Harris J. Sklar, your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 9, 1971.

Opinions Below

The Opinion of the Court below (Appendix A, infra 1a), is reported as 445 F.2d 385. The Opinion of the District Court on a Certificate of Review from the Order of the Referee in Bankruptcy is reported as 313 F. Supp. 589 (Appendix B, infra 7a). The Opinion and Order of the Referee is unreported but is appended hereto (Appendix C infra 13a).

Questions Presented

1. Whether an unsuccessful offeror at a Bankruptcy Sale is a party in interest under the Bankruptcy Act or decisional law enabling him to appeal to the Court of Appeals from an Order of the District Court confirming a judicial sale to another and successful bidder under the provisions of 11 U.S.C. §347 or 28 U.S.C. §1292(a)(2).

2. Whether an unsuccessful offeror at a Bankruptcy Sale has standing to appeal to the Court of Appeals from an order of the District Court confirming a judicial sale to another and successful bidder where he was not a party to the proceedings in the District Court and had not petitioned to intervene or been allowed to intervene before the District Court under the provisions of Rule 24 of the Federal Rules of Civil Procedure.

3. Whether the decision of the Court of Appeals was in conformity with 11 U.S.C. §110(f) in reversing the decision of the District Court which reinstated an order of confirmation to the success-

ful bidders at a judicial sale of the bankrupt's real property where the record did not disclose fraud, accident or mistake in the sale and where the sale price was in excess of the value of the property as appraised by the Court-appointed appraisers and the purchasers were innocent bona fide purchasers.

4. Whether the reversal of the District Court's reinstatement of the order of confirmation by the Court of Appeals for reasons of "common decency" offends the requirement of Article I Section 8 Clause 4 of the Constitution requiring that bankruptcy laws be "uniform."

Statutes Involved

1. Section 24 of the Bankruptcy Act, as amended, 11 U.S.C. §47, as it relates to Jurisdiction of Appellate Courts, provide:

(a) "The United States Court of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact":

2. Section 58 (a) (4) of the Bankruptcy Act, as amended, 11 U.S.C. §94, as it relates to notices required to be given where there is a proposed sale of property of a bankrupt, provides:

(Insert)

JURISDICTION

The judgment of the court below was entered on July 9, 1971. Rehearing was denied on August 19, 1971. This petition was filed within 90 days from the date on which rehearing was denied. The jurisdiction of this Court is invoked under 11 USC 47 (c) and 12 USC 1254 (1).

(a) "Creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of . . .; (4) all proposed sales of property".

3. Section 70 (f) of the Bankruptcy Act, as amended, 11 U.S.C. §110(f) as it relates to the sale of property of a bankrupt estate, provides:

"The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75% of its appraised value."

Statement

The facts of this case are not in dispute.

Times Sales Finance Corporation, et al, an adjudicated bankrupt, had among its assets certain real property which was appraised at $90,000 by court appointed appraisers. The Trustee respondent entered into a written agreement with Jerome Rosoff to sell this property to him for $90,000 subject to certain conditions, free and clear of all liens and encumbrances, subject to confirmation by the Court. The Trustee petitioned the Referee for leave to sell at private sale. The Referee

then entered an Order directing that ten days written notice be given to all creditors and parties in interest that a hearing would take place on October 13, 1969, at which time the creditors could consider the bid and object if they desired and that other bids might be considered.

On the return day, counsel for the Trustee filed an Affidavit of mailing of notice "in accordance with the Referee's Order;" stated that the hearing was also on notice to all general creditors; and that he believed the offer of $90,000 to be fair and reasonable and recommended the sale. The Referee asked for higher bids whereupon the petitioners offered $90,500 which was accepted as the highest bid and the Referee entered an Order of confirmation in favor of the high bidders, the petitioners.

After confirmation, the Trustee informed the Referee that he had failed to give notice of the hearing to the offeror which had only then come to his attention and moved the Court to set aside the Order of Confirmation in fairness to the offeror. The Referee on motion of the Trustee, after hearing, set the confirmation aside on that ground of "fairness to the original bidder". Petitioners appealed and the District Court Judge reinstated the Order of Confirmation to the petitioners.

Both the Trustee and the bidder, Rosoff, appealed to the Court of Appeals. Petitioners moved to quash Rosoff's Appeal on the ground that he had no standing to appeal and had not intervened in the Court below. This motion was denied.

The Court of Appeals reversed the District Court Judge and reinstated the Referee's Order. A Petition for Rehearing was timely filed and denied.

The District Court found as a fact that the Referee had abused his discretion in setting aside the confirmed judicial sale because the confirmed sale to the petitioners was not fundamentally defective; that the equities were in favor of the petitioners and there was no fraud, accident or mistake or some other cause for which equity would avoid a like sale between private parties. Also, that neither under the Act or decisional law was the offeror entitled to notice.

The Court of Appeals reversed on the ground that the offeror was a party in interest who was entitled to notice of the hearing on his bid and an "all important innocent mistake of the trustee's attorney that directly produced the totally unfair exclusion of Rosoff from the hearing on his own bid. The major question is one of "common decency" stated the Court of Appeals.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in direct conflict with long established decisions of Courts of Appeals of other circuits and state courts which, in recognition of the public policy favoring stability in judicial sales and so as to avoid the chilling of bidding at such sales both in bankruptcy and state judicial sales, have held that a confirmed judicial sale should not be set aside in the absence of fraud, accident or mistake or

some other cause for which equity would avoid a like sale between private parties. Morrison v. Burnette, 154 F.614 (8 Cir. 1907) Re: Wolke Lead Batteries Co., 294 F.509 (1923, CAKY).

If allowed to stand, this decision will cause confusion and uncertainty among prospective bidders at all judicial sales in bankruptcy procedures as well as ordinary execution on civil judgments including those conducted in state courts. Bona fide purchasers will never be sure of retaining the fruits of their bargain. This will cause disruption in the many judicial sales conducted throughout the nation. The issue is significant for thousands of such sales are conducted each year.

Not only is the substance of the decision disruptive to judicial sales, but in this case the procedure employed is in derogation of the statuatory provisions and Rule 24 of the Federal Rules of Civil Procedures. If allowed to stand, the case below will stand for the provision that an unsuccessful offeror may appeal a judicial sale whether or not he petitions for leave to intervene or the petition be granted. Such a procedure leaves too much room for chaos in the judicial system, affecting not only bankruptcy sales but all matters arising under the Federal Rule of Civil Procedure. More significantly, if the proceedings below are treated as if a petition to intervene had been allowed, the cause would stand for authority that every offeror at a judicial sale is a party in interest. This is contrary to established decisional law. It will lead to chaos and disruption in the ordinary administration of the Bankruptcy Laws.

2. The decision conflicts with prior decisions of the Court of Appeals for the Third Circuit, especially the reasoning in the case of In Re Stanley Engineering Corporation, 164 F. (2a) 316 (3 Cir. 1947) cert. den. sub nom. Root v. Galman 332 U.S. 847 (1948).

This issue was pointed out in the requested reargument. Perhaps this case is testimony to the adage that "Hard cases make bad law." However, this Court should, in its supervisory aspect cut off the bad law lest it spread and dull the efficacy of judicial sales.

Perhaps this aspect of the cause may be cured by the grant of the writ of certiorari and remand of the cause to the Court of Appeals for the Third Circuit en banc. See U.S. ex rel Robinson v. Johnston 316 U.S. 649, 62 SCT 1301 (1942).

3. The premise of the decision based upon a consideration of "common decency" offends the United States Constitution, Article 1, Section 8, Clause 4 which requires that laws on the subject of bankruptcy be "uniform".

This issue of uniformity appears to be one of first impression. In Stellwagen v. Clum 245 U.S. 605 (1918) the "uniformity" issue was raised in the context of recognition of different laws of different states which created different rights in property. Definition of property rights being a state matter, it was felt that there was no constitutional problem.

A related issue was presented in Hanover National Bank v. Moyses 186 U.S. 187 (1902). There the question was whether others than traders could avail themselves of bankruptcy, particularly in view of the Constitutional debates. It was determined that the uniformity was met as to "all bankruptcies" and it was "geographic" and not "personal."

The instant case is far different from both decided issues. It arises because a Federal Court of Appeals has enunciated a Federal Standard regulating Federal Procedure. The authority of the Referee under 11 U.S.C. §1106 (f) does not flow from any state created property right, exemption or privilege.

In the interest of "uniformity" and to reduce "forum shopping," standards must be the same wherever the Bankruptcy authority extends. The holding below is to the contrary.

Questions of "common decency" will necessarily vary from locality to locality, referee and judge to referee and judge and, indeed, from trade to trade. What would be "decent" will necessarily vary from place to place.

Since the variation is of federal procedure, it is constitutionally impermissible.

It is possible that the Court may not reach this issue if the cause is decided upon other grounds. Nevertheless, the issue is raised in this case, albeit only initially by the basis on which the Court of Appeals determined its decision.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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November 5, 1971

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 19,239 and 19,240

- -x

In the Matter of: TIME SALES FINANCE CORPORATION and Its Wholly Owned Subsidiary Corporations, CHATEAU REALTY CORPORATION and MARPOOLE, INC.

- -x

(D. C. No. 30377 in Bankruptcy)

RAYMOND R. WALSH, Trustee in Bankruptcy of the Estate of Time Sales Finance Corporation, Bankrupt,

Appellant in No. 19,239

JEROME ROSOFF,

Appellant in No. 19,240

OPINION OF THE COURT

(Filed 7/9/71)

McLaughlin, Circuit Judge.

Opinion Below

In this bankruptcy matter, the trustee filed a petition with the referee for authority to sell certain real estate of the bankrupt at private sale, free and clear of liens and encumbrances, to appellant Jerome Rosoff for $90,000. This was subject to a six percent commission to the broker who had obtained the purchaser.

The referee fixed October 13, 1969 as a hearing date and directed that notices of same be sent to all known creditors, parties in interest, the taxing authorities, the mortgagee and counsel for the creditors' committee. The referee at the hearing asked if there were any bids higher than that of Mr. Rosoff. Bernard Gross, an attorney, for himself, his partner Mr. Sklar and their wives, bid $90,500.00. As that was the highest bid made, the referee confirmed the sale to Mr. Gross and his associates.

Within an hour of the confirmation, counsel for the trustee informed the referee that through an oversight he had failed to notify Rosoff, the original bidder, or his real estate broker of the time and place of the hearing for consideration of the proposed sale. As a result neither Rosoff or his real estate man was present. The referee then fixed October 16, 1969, as a hearing date for testimony on the question of whether the order confirming the sale should be reconsidered.

In his opinion and order of November 20, 1969, the referee held that Rosoff was clearly a "party in interest" who was entitled to notice of the October 13th hearing. That holding cannot be

faulted. The sole reason for the meeting was the petition of the trustee for permission to sell the particular property to Rosoff for $90,000.00. The latter had a vital interest in attending the hearing personally or by his real estate broker, not only to protect his bid but if there were a higher bid or bids, to meet it or them and if necessary and he so desired, to top any raise in the bidding.

In ordering that the confirmation of the sale be set aside and another sale hearing be held the referee ruled that under the indisputable circumstances "To permit this sale to stand would be unconscionable."

On petition for review the district judge stated "The pivotal issue before this Court is whether the referee abused his discretion in setting aside the Order of Confirmation dated October 13, 1969." The judge properly conceded that a fundamental defect arising through accident or mistake vitiates a confirmed sale. (Collier on Bankruptcy, Vol. 4A §70.98 pp. 1183-1187.) And he frankly stated that "It is unfortunate that the original bidder, Rosoff, was not given notice of the confirmation hearing by the Trustee. . . ." The court then reversed the ruling of the referee because it "cannot find that the sale to the confirmed bidder Gross was so fundamentally defective and unfair as to justify the referee in setting aside the sale after confirmation." (Emphasis supplied.) Having in mind that admittedly the question of whether the sale to Gross should be set aside was within the discretion of the referee it is significant that

the judge actually in effect did find that the Gross sale was fundamentally defective and unfair to Rosoff but not to the extent of setting that sale aside. Nowhere in the district court opinion is there a holding stating that the referee abused his discretion in setting the sale aside and ordering a new hearing regarding the sale of the property involved.

As above noted the trustee had been directed by the referee to send notices of the meeting to all known creditors and parties in interest. At the hearing, the trustee's attorney advised the referee that he had done so. He so spoke because he thought he had notified Rosoff's real estate representative. Testifying at the hearing, the attorney said that he had been mistaken about notifying Rosoff's agent. He further testified that "The referee would not direct me to send notice to the proposed purchaser because having been in the practice of law for many years he knows and would assume an experienced counsel for the Trustee would have sent notice to a proposed purchaser of a private sale. I think in 35 years of practice in bankruptcy law, this is the first case I ever neglected to notify the proposed purchaser at a private sale." There is nothing in this record warranting appellee's deliberate assumption that the referee and Mr. Chait, attorney for the trustee, considered that the meeting notification called for by the referee had been performed by Mr. Chait. The latter as a hearing witness, entirely disagreed with the assumption of the Gross lawyer. Mr. Chait testified that it was his own mistake in thinking that he had

notified Rosoff (the prime party in interest) through Rosoff's real estate agent, of the confirmation hearing on October 13, 1969. It was because Rosoff in fact had not been so advised of the hearing and therefore was not present himself or by his representative, that the referee rightly determined that the sale had been basically unfair to Rosoff and must be set aside. As Mr. Chait said "If I had known that I had not notified Lanard and Axilbund (Rosoff's real estate agents) I would have requested an adjournment to find out or to give them notice and to rectify the error I had made. I had assumed that they had been notified, which was my error."

Appellee expressly relies upon In re Stanley Engineering Corporation, 164 F.2d 316, 318 (3rd Cir. 1947) as does the district judge. Appellee urges this court to affirm the district court on that basis "in the interest of preserving integrity in judicial sales." In Stanley the rule under which this opinion is written is sharply emphasized and reads pp. 318, 319:

> "That judicial sales, made upon due notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale; . . . . Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion." (Emphasis supplied.)

Opinion Below

In this appeal we have the all important innocent mistake of the trustee's attorney that directly produced the totally unfair exclusion of Rosoff from the hearing on his own bid. The major question is one of common decency. The referee immediately, and completely within his sound discretion, called for a new hearing which gave everybody concerned equal opportunity to buy the particular property.

The referee's action was sound and right and strictly in line with the Stanley opinion. The order of the district court was clearly wrong. It will be reversed and the case will be remanded to the bankruptcy court for the hearing contemplated by the order of said court of November 20, 1969.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF PENNSYLVANIA

[Same Title]

CLARY, J. JUNE 4, 1970.

This matter comes before the Court on a Petition for Review of an Order by the Referee in Bankruptcy in which the Referee set aside an earlier Order which confirmed the sale of premises 1306 Arch Street, Philadelphia, Pennsylvania, to the petitioners. The Referee's Certificate on the Petition for Review was filed with this Court on December 19, 1969. A hearing on the Petition was held by this Court on April 14, 1970, and briefs were submitted.

The premises in question were assets of the bankrupt estate and were appraised by a Court-appointed appraiser at a value of $90,000. The Trustee of the bankrupt estate entered into a written agreement of sale with Jerome Rosoff whereby he agreed to sell the premises to Rosoff, or nominee, for $90,000 subject to certain conditions, free and clear of all liens and encumbrances. The sale was expressly subject to confirmation by the Bankruptcy Court. On September 26, 1969, the Trustee filed a Petition with the Referee for an Order approving the private sale to Rosoff for $90,000., subject to a 6% real estate commission, to Lanard & Axilbund, Inc.

District Court Opinion

The Referee ordered a hearing on the Petition and ordered ten days' written notice to all known creditors and parties in interest. The Referee notified the creditors and parties in interest. The Referee notified the creditors that the hearing would be on October 13, 1969. At the hearing on the latter date, the Trustee presented an Affidavit of Mailing of Notices in accordance with the Court's Order and stated that the hearing was also on notice to all general creditors. Apparently, quite a few creditors were present at the hearing. The Trustee also alleged that he believed the consideration of $90,000 to be fair and reasonable. The Referee asked whether there was any objection on the part of any party in interest to the sale being free and clear of all liens and encumbrances, and after receiving no response, he asked whether anyone wanted to offer more than the $90,000 offer contained in the Petition. A bid of $90,500 was made by Bernard M. Gross, and there being no higher bids, the Referee entered an Order of Confirmation directing the Trustee to sell to the high bidder, Bernard M. Gross, or nominee, in consideration of $90,500. Within an hour of the confirmation, the Trustee informed the Referee that notice of the hearing on the Petition to sell had been given to neither Mr. Rosoff, the original bidder, nor to the real estate broker, Lanard & Axilbund, Inc. The Referee then reconvened the hearing and stated that the bidding should be reopened for the benefit of the estate and in fairness to the original bidder. After the Referee ascertained that the original bidder was willing to bid in excess of $90,500, he ordered a rehearing. After submission of briefs, the Referee entered

his Opinion and Order, dated November 20, 1969, setting aside his earlier confirmation of the sale and ordering that another hearing be held. It is this Order which is the basis of the Petition for Review.

The pivotal issue before this Court is whether the Referee abused his discretion in setting aside the Order of Confirmation dated October 13, 1969.

The setting aside of a confirmed sale is a matter within the equitable jurisdiction of the Bankruptcy Court. There is a distinction between proceedings to set aside a sale and confirmation proceedings, which is particularly important when irregularities in the sales procedure are asserted. Irregularities that fall short of fundamental defects cannot be availed of as grounds for vacating a confirmed sale. Collier on Bankruptcy, Vol. 4A, §70.98, pp. 1183-1187. A confirmed sale should be set aside only on the grounds of fraud, accident or mistake, or some other cause for which equity would avoid a like sale between private parties. Morrison v. Burnette, 154 F. 617 (8 Cir., 1907).

This Court cannot find that the sale to the confirmed bidder, Gross, was so fundamentally defective and unfair as to justify the Referee in setting aside the sale after confirmation. There is nothing in either statutory or decisional law which requires that notice be given to a prospective purchaser whose bid is subject to confirmation by the Bankruptcy Court. It is unfortunate that the original bidder, Rosoff, was not given notice of the confirmation hearing by the Trustee, but whatever

equity principles favor the original bidder are far outweighed by the equities in favor of the confirmed bidder. The confirmed bidder had gained equitable title as the result of confirmation. In the Matter of Burr Mfg. and Supply Co., 217 F. 16 (2 Cir., 1914).

The judicial sale involved here was a private sale and the original bidder knew that his offer was subject to the confirmation of the Bankruptcy Court. The record indicates that the original bidder and his counsel did nothing to inform themselves of the date of the impending hearing. The Trustee and his counsel had full knowledge of the original bidder's interest in the sale, knew of the absence of both Rosoff and his counsel, and yet allowed the proceedings to continue. The confirmed bidder, Gross, attended the confirmation hearing in order to bid on the property involved and there is no dispute that he was an innocent purchaser who was not responsible for the absence of Rosoff and his counsel at the confirmation hearing. If the original bidder, Rosoff, intended to bid higher than his original bid, it was incumbent upon him to make arrangements in advance to protect his interest against the danger that he might be outbid when his privately contracted bid was exposed to other bids at the confirmation hearing. For example, he could have informed the Trustee in advance that he was willing to bid higher than his contract bid.

This is not a case where there was an inadequate price accepted by the Referee when he confirmed the sale to Gross. The Referee's

finding that the "price appears to have been inadequate" is not supported by the record. The Trustee alleged at the confirmation hearing that the bid of $90,000 was fair and reasonable. The confirmed bid of Gross, in the amount of $90,500, was $500 higher than the appraisal value set by the Court-appointed appraiser. Merely because the original bidder indicated that he would be willing to enter a higher bid after confirmation is no excuse to set aside the confirmation and reopen bidding. The primary concern of the Bankruptcy Court must be the interest of the creditors; but in this case, all of the creditors present approved the sale and no objection has been made by any creditor to the entry of the Order of Confirmation.

Public policy requires stability in judicial sales, whether public or private. In the case of In re Stanley Engineering Corporation, 164 F.(2d) 316 (3 Cir., 1947), cert. den. sub nom. Root v. Galman, 332 U.S. 847 (1948), the Third Circuit recognized this policy favoring stability and finality in judicial sales, even though the Court in that case was dealing with a failure to confirm a judicial sale and was not dealing with the setting aside of a confirmation order. The public policy considerations enunciated in Stanley apply more strongly to a case such as the present one where an Order of Confirmation had already been entered. Unlike the public sale involved in Stanley, the genuine competitive bidding at an authorized private sale takes place at the confirmation hearing. In order to induce reliance upon private judicial sales and encourage bidding at hearings to confirm private sales, something more must be

shown than has been shown in the present case in order to justify the Referee in setting aside his Order of Confirmation.

O R D E R

AND NOW, to wit, this 4th day of June, 1970, for the reasons set forth in the foregoing Memorandum, it is ORDERED, ADJUDGED AND DECREED that the Order of the Referee dated November 20, 1969 be SET ASIDE, and the Order of Confirmation dated October 13, 1969 be CONFIRMED.

BY THE COURT:

s/ Thomas J. Clary
Thomas J. Clary, J.

APPENDIX C

Referee's Opinion

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENSYLVANIA

[Same Title]

By Emil F. Goldhaber, Referee in Bankruptcy.

The trustee in bankruptcy of Time Sales Finance Corporation filed a petition seeking to sell the premises 1306 Arch Street, Philadelphia, Pa., at private sale, free and clear of liens and encumbrances to one Jerome Rosoff for $90,000. This sale was subject to the payment of a 6 percent commission to Lanard & Axilbund, Inc., the real estate broker who obtained the purchaser. I fixed a hearing for October 13, 1969, and directed that notices of that hearing be sent to the various taxing authorities, the mortgagee, counsel for the Creditor's Committee, and "to all known creditors and parties in interest."

At the said hearing I inquired whether there were any higher bids, and Bernard M. Gross, Esq., a member of the bar, made a bid of $90,500.00 on behalf of himself and his partners, Harris J. Sklar, and their respective wives. (The issue of whether Mr. Sklar's law firm would be entitled to commissions on this transaction was left for future determination by this Court.) No higher bid being made, I then entered an Order confirming the sale to the higher bidder.

Referee's Opinion

Shortly thereafter (within a half hour, in fact) counsel for the trustee advised the Court that, through oversight, he had failed to notify the original bidder or the realtor of the time and place of the hearing to consider the proposed sale and that, as a result, neither the bidder nor his real estate broker was present. I then set October 16, 1969, as a date for a hearing to take testimony to determine whether I should reconsider my Order confirming the private sale.

My Order, dated September 26, 1969, specifically directed:

> "1. That a hearing on the attached petition be held before this Court on the 13th day of October, 1969, at 10:00 A.M., in Hearing Room 3042 United States Court House, 9th & Chestnut Streets, Philadelphia, Pennsylvania, upon at least ten (10) days notice in writing, by ordinary mail, to all know creditors and parties in interest."

While notice in writing was given "to all known creditors," neither formal nor actual notice was given to the offeror or his agent, although, clearly, the offerer was a "party in interest."

To permit this sale to stand would be unconscionable because the very authority for making the sale was my Order of September 26, 1969, which contained a mandate that notice be given to "all parties in interest." While it is true that judicial sales, made upon due notice and in accordance with the law, should be confirmed unless

there was fraud, unfairness or mistake in the conduct of the sale: In re Stanley Engineering Corporation (C.C.A. 3) 164 F.2d 316, the failure to give such notice to the original offeror was, in itself, unfair and created a fundamental defect of such magnitude as to shock the consoience of the Court and to require that the confirmation of the sale be set aside.

Counsel for the successful bidder refers to the case of Allen v. Union Tranfer Co., (C.C.A. 10) 152 F.2d 633, and I am persuaded by the rationale of that decision. Said the Court: "While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy of price, accompanied by other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale."

Furthermore, said the Court, "Notice of the sale was given in strict compliance with statutory requirements."

In the instant case, notice to creditors and parties in interest was to be made, not "in strict compliance with statutory requirements," but in strict compliance with the Court's order. Through inadvertence, such notice was not given to a party in interest (the offeror). As a result, the price appears to have been inadequate, and it is apparent that this inadequacy was caused by the failure to give the notice directed by the Court's order.

Referee's Opinion

Under these cirsumstances, the Bankruptcy Court, which is a court of equity, should remedy the unfairness to the original offeror and set aside confirmation of the sale.

ORDER

AND NOW, to wit, this 20th day of November, 1969, after hearing, and for the reasons stated heretofore, the Court reconsiders its Order of October 13, 1969, and sets aside its confirmation of the sale of premises 1306 Arch Street, Philadelphia, Pa., and the Court directs that another hearing be held, upon due notice to all parties as set forth in the Court's order of September 26, 1969.

s/ Emil F. Goldhaber
EMIL F. GOLDHABER
Referee in Bankruptcy

APPENDIX D

Judgment Below

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 19239/40

In the Matter of
TIME SALES FINANCE CORPORATION and its wholly owned subsidiary corporations, CHATEAU REALTY CORPORATION and MARPOOLE, INC.

RAYMOND R. WALSH, Trustee in Bankruptcy of the Estate of Time Sales Finance Corporation, Bankrupt,

Appellant in No. 19239

JEROME ROSOFF,

Appellant in No. 19240

(D.C. No. 30377 in Bankruptcy)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, ALDISERT and GIBBONS, Circuit Judges.

Judgment Below

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 4, 1970, be, and the same is hereby reversed, and the cause remanded to the bankruptcy court for the hearing contemplated by the order of the said court of November 20, 1969, in accordance with the opinion of this Court. Costs taxed in favor of appellants.

ATTEST:

s/ Thomas F. Quinn
Clerk

July 9, 1971.

Costs taxed in favor of appellant as follows:

Clerk's fees	$ 50.00
Brief and appendix	478.95
TOTAL	$528.95

Certified as a true copy and issued in lieu of a formal mandate on August 30, 1971.

Test. THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit.